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Supreme Court of the United States

OCTOBER TERM, 1914.

No. [redacted] 290

NEW-YORK LIFE INSURANCE CO.,
Petitioner,

vs.

EFFIE J. GOULD DUNLEVY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
CHARLES W. WILLARD,
J. M. MANNON, JR., and
JAMES H. MCINTOSH,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No._____ .

NEW-YORK LIFE INSURANCE COMPANY, Petitioner, *vs.* EFFIE J. GOULD DUNLEVY, Respondent.	*Petition for Writ of Certiorari.*

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, New-York Life Insurance Company, represents to this Honorable Court that the case of New-York Life Insurance Company, Plaintiff-in-Error, against Effie J. Gould Dunlevy, Defendant-in-Error, lately decided by the United States Circuit Court of Appeals for the Ninth Circuit, affirming by a divided court a judgment of the District Court of the United States for the Northern District of California, is a civil case in which the judgment of said Circuit Court of Appeals is made final by the provisions of The Judicial Code, and therefore your Petitioner now here applies to this Honorable Court to require by Certiorari or otherwise said case to be certified to the Supreme Court for its review and determination, for that said judgment unless reversed will compel your Petitioner to pay in full a second time a policy

of insurance which it already duly paid into Court in Pittsburgh, pursuant to a valid Writ of Execution Attachment Sur Judgment issued out of said Pittsburgh Court and duly served upon your Petitioner there for the purpose of reaching the proceeds of said policy to satisfy a money judgment, the validity of which is not questioned, which Boggs & Buhl duly recovered in said Pittsburgh Court against said Effie J. Dunlevy, the plaintiff in said California suit, and will deprive your Petitioner of its constitutional rights by failing to give full Faith and Credit to the judicial proceedings of the courts of the State of Pennsylvania.

And in this behalf your Petitioner further says,—

First.—Boggs & Buhl, a corporation, sued Effie J. Dunlevy in the Court of Common Pleas for Allegheny County, Pennsylvania, at Pittsburgh, on an account for goods sold and delivered (p. 44, et seq.) and she was duly served with process of Summons in said case at her then place of residence in Allegheny County on the 24th day of June, 1907 (p. 58). July 8, 1907, judgment by default was duly entered in said suit against her for $537.76 (pp. 59 and 43). The validity of said service of Summons on Mrs. Dunlevy and of the judgment recovered against her is not questioned in this record (p. 217).

Second.—Your Petitioner became liable to pay the value of its policy No. 305,011 (p. 84) on the life of Joseph W. Gould, the father of Mrs. Dunlevy, at the expiration of its tontine period, January 24, 1909, but was prevented from promptly paying it because of the conflicting claims thereto of Mrs. Dunlevy, on the one hand, and the insured, her father, on the other.

Third.—The rival claims of Mrs. Dunlevy and of her father to the proceeds of said policy were as follows,—

Mrs. Dunlevy claimed the proceeds thereof under an assignment of it to her (p. 101), which her father executed in 1893, when she was thirteen years old (p. 212), but which (p. 211) he never delivered to her. He filed the assignment with the Company in 1893 (p. 102) but she knew nothing about the assignment until notified thereof by the Company at the maturity of the policy. He never delivered the policy to her (p. 211).

Mr. Gould claimed the proceeds of the policy on the ground (p. 112) that by the assignment he did not intend (p. 117) to pass any title to the policy except in the event of his death before its maturity, and that neither the assignment nor the policy ever was delivered to her, and that he paid all of the premiums thereon.

Fourth.—While this dispute between the rival claimants was going on, Boggs & Buhl, November 11, 1909 (p. 66), duly caused process of (p. 64) "Execution Attachment Sur Judgment" in said suit of Boggs & Buhl against Effie J. Dunlevy to be served on your petitioner at Pittsburgh (p. 66), thereby attaching (p. 66) "all and singular the debts due said defendant", Effie J. Dunlevy, and duly citing your petitioner to answer as garnishee in said suit. This same process ran to Mrs. Dunlevy's father, Joseph W. Gould, and was served on him the same day (p. 66) it was served on your petitioner.

Boggs & Buhl, at the time of suing out this process of Execution Attachment Sur Judgment, also then and there duly filed interrogatories (p. 67) to be answered by said garnishees with respect of any indebtedness either garnishee might then owe said Judgment Debtor.

Fifth.—February 5, 1910, your Petitioner duly filed its written answer as garnishee and its answers to said interrogatories (pp. 75 to 120 inclusive), therein and thereby admitting its indebtedness on account of said policy and alleging its readiness to pay it, but fully setting

forth the conflicting claims thereto of said rival claimants and concluding its said answer with the following prayer (p. 81),—

> "WHEREFORE said garnishee having fully answered prays that it may be duly advised as to its rights and duties in the premises, and that upon its discharge it may be allowed a reasonable sum for its costs and disbursements."

Sixth.—The same day your Petitioner answered as garnishee, it also filed in said case of Boggs & Buhl against Effie J. Dunlevy a petition setting forth said rival claims of Effie J. Dunlevy, on the one hand, and said Joseph W. Gould, on the other, to the proceeds of said policy, and praying (p. 127),—

> "Your Honorable Court for a rule on said Effie J. Dunlevy, Joseph W. Gould and Boggs & Buhl, Incorporated, to show cause why they should not interplead together for the purpose of ascertaining to which of said parties the money in the hands of petitioner belongs, and why your petitioner should not be permitted, when it is determined to whom the money ought to be paid, to pay the said sum of Two Thousand Four Hundred Seventy-nine and 70/100 ($2,479.70) Dollars into Court for the benefit of such person as shall appear to be entitled thereto, and for such further orders in the premises as to your Honors may seem necessary."

And thereupon the Court that day duly made the following order (p. 128),—

> "And, now, to wit, Febry. 5th, 1910, the foregoing petition of the New-York Life Insurance Company, Garnishee, being presented in open Court, upon consideration thereof and on motion of Gordon & Smith, attorneys for petitioner, a rule is granted on Effie J. Dunlevy, Joseph W. Gould and Boggs & Buhl, Incorporated, to show cause why they should not interplead together for the purpose of ascertaining to which of said parties the money in the hands of the New-York Life Insurance Company belongs, and why said

Company should not be permitted, when it is determined to whom the money ought to be paid, to pay said sum of Two Thousand Four Hundred Seventy-nine and 70/100 ($2,479.70) Dollars into Court for the benefit of such person as shall appear to be entitled thereto. And it appearing that the said Effie J. Dunlevy is a resident of the State of California, it is hereby ordered and decreed that service of said rule upon Effie J. Dunlevy be by serving her personally with a copy of the same by mail or registered mail, to her last known address."

Seventh.—Effie J. Dunlevy was duly and personally served in San Francisco, California, February 18, 1910 (p. 135), with written notice (p. 137) that in said case of Boggs & Buhl against her "a rule to show cause why Effie J. Dunlevy, Jos. W. Gould and Boggs & Buhl, Incorporated, should not interplead together for the purpose of ascertaining to which of said parties $2,479.70 in the hands of the New-York Life Insurance Company belongs, has been granted in the above-entitled case returnable February 26, 1910", and a copy of said petition upon which said Court made said order to show cause and of said order itself was also there and then duly served on her. But she never paid any attention thereto.

Eighth.—February 23, 1910, The Lincoln National Bank, a creditor of Mrs. Dunlevy, sued her at Pittsburgh and there garnished your Petitioner (p. 163), and on the same date Charles Elste, another creditor of Mrs. Dunlevy, brought a like suit and served garnishment process on your Petitioner.

Thereupon, and on the 19th of March, 1910, your Petitioner filed another petition in said suit of Boggs & Buhl against Effie J. Dunlevy (p. 161), therein directing the Court's attention to its said petition of February 5, 1910, the allegations thereof and said order made thereon, and therein further alleged the serving upon it of said writs of garnishment in said several suits of The Lincoln Na-

tional Bank and Charles Elste against said Effie J. Dunlevy, concluding its said petition with the following prayer (p. 163),—

> "Wherefore, your Petitioner prays your Honorable Court to make an order permitting it to pay the sum of Two Thousand Four Hundred Seventy-nine and Seventy One-Hundredths ($2,479.70) Dollars into this Court, to abide the result of the Issue to be framed by the Court, and for such other and further relief as the nature of the case may require."

And thereupon, in said case of Boggs & Buhl against Effie J. Dunlevy, the Court there and then made the following order (p. 164),—

> "And now, to wit, March 19, 1910, the foregoing petition of the New-York Life Insurance Company, garnishee, presented in open Court, and it appearing that the consent of the Lincoln National Bank of Pittsburgh and of Charles Elste, has been obtained, upon consideration thereof, and upon motion of Gordon & Smith, Attorneys for Petitioner, it is ordered, adjudged and decreed that the New-York Life Insurance Company be given leave to pay the sum of Two Thousand Four Hundred Seventy-nine and Seventy One-hundredths ($2,479.70) Dollars into this Court, to abide the result of the issue to be framed by this Court."

Ninth.—Thereafter your Petitioner, as garnishee, duly paid said proceeds of said policy into said Court in said case of Boggs & Buhl against Effie J. Dunlevy, and the Clerk of the Court duly received and held said proceeds subject to the further order of the Court in said case, as is shown by the following entry which the Clerk then made in the Appearance Docket in said case of Boggs & Buhl against Dunlevy, to-wit (p. 62),—

> "Mch. 21, 1910, Received of Gordon & Smith, attys. for New York Life Insurance Co. the sum of Twenty-Four Hundred Seventy-nine and 70/100 ($2,479.70)

Dollars, less poundage on same, leaving the sum of Twenty-Four Hundred Seventy-One and no/100 ($2,471.00) Dollars, which sum I have deposited subject to the further order of Court."

Tenth.—What was done about the proceeds of this policy after your Petitioner, as garnishee, thus paid it into the Pittsburgh Court to the credit of said case of Boggs & Buhl against Mrs. Dunlevy, is wholly immaterial in an independent suit brought by her to make your Petitioner pay it a second time. For she was in the Pittsburgh Court in the Boggs & Buhl case as a Judgment Debtor, and payment into that Court, pursuant to said Writ of Execution Attachment Sur Judgment and said order of the Court, was as between her and your Petitioner the same in legal effect as payment to her.

But these things done by the Pittsburgh Court after your Petitioner so paid the policy into that Court, are the basis of the judgment of the California Court holding your Petitioner liable to pay Mrs. Dunlevy this policy again, and, therefore, for the convenient understanding of the California Court's decision, they should be stated here and are as follows,—

1. The same day that the Court ordered your Petitioner to pay the proceeds of the policy into Court in the Dunlevy case, the Court also made an order in that case (p. 62) that a "Feigned Issue" be made up and tried for the purpose of determining what the Court should do with the money thus paid into Court. Although this Feigned Issue was put upon a docket apparently kept in the Pittsburgh Court for the purpose of trying such questions as they arose in cases regularly pending in the Court, it was not an independent case, but like any reference, was, in legal effect, merely an inquiry in the case of Boggs & Buhl against Dunlevy for the purpose of finding out to whom the money paid into Court in that case belonged, all the parties claiming the fund being in Court

in that case, or assenting to the payment into Court in that case and to the Court's inquiry.

Boggs & Buhl and Mrs. Dunlevy were in Court in that case as the parties thereto. Mr. Gould was in Court in that case as a garnishee, and also assented to the inquiry and took part in it. The Lincoln National Bank assented in writing to the payment of the money into Court in that case and intervened therein (p. 62), and Charles Elste, the only other claimant, assented in writing (p. 166) to said payment into Court.

2. In the decision of the Court ordering the Feigned Issue to be tried, the Court held that Mrs. Dunlevy (p. 161) "is the actor upon whom rests the burden of establishing her title. Hence she and those representing her in interest in the fund must be named as plaintiffs in the Feigned Issue, and it is so ordered".

3. The issue as to the rights of said several claimants to said fund was duly tried September 19, 1910 (p. 174), and found in favor of Mr. Dunlevy's father, the insured (p. 170). Mrs. Dunlevy did not appear at the trial of the question of the right to the money and thereafter the Court duly ordered the Clerk to pay to Mr. Gould said proceeds of said policy, which had been (p. 172) "received by him (the Clerk) in proceedings at No. 253 First Term, 1910, of this Court", which said "No. 253—First Term, 1910" was said case of Boggs & Buhl *v.* Effie J. Dunlevy (p. 60). And the Clerk duly complied with said order.

Eleventh.—Mrs. Dunlevy commenced this suit against your Petitioner to recover the proceeds of said policy in California January 4, 1910 (p. 6), after said Writ of Execution Attachment Sur Judgment had been served on your Petitioner as aforesaid in said Boggs & Buhl suit against her in Pittsburgh.

Your Petitioner answered in California in April, 1910 (p. 33), in its answer alleging said judgment against Mrs.

Dunlevy in said case of Boggs & Buhl against her at Pittsburgh, the service upon it therein of said Writ of Execution Attachment Sur Judgment, its answer to said Writ, said order of the Court directing your Petitioner to pay, and its payment of, the proceeds of said policy into said Court in said cause, and attached to and made a part of its said answer (p. 41) a duly certified (p. 192) transcript of said proceedings in said case of Boggs & Buhl *v.* Dunlevy.

Twelfth.—The Court tried the California case on an agreed statement of facts (p. 207 et seq.), the material part of which, so far as your Petitioner is concerned, was (p. 209) the certified copy of the record of the Pittsburgh Court in the case of Boggs & Buhl against Dunlevy, which was attached as an Exhibit and made a part of the defendant's answer, and which the parties agreed (p. 209) at the trial was "a full, complete and correct exemplification of the entire record of all proceedings had in the Courts of the State of Pennsylvania with reference to the policy of life insurance and the moneys involved in the above-entitled action."

Mrs. Dunlevy testified on the trial (p. 212) but her testimony is not material to your Petitioner's case.

The learned Trial Court and the majority of the Circuit Court of Appeals, which followed the reasoning of the Trial Court, missed entirely the real point in the case, namely, that your Petitioner, as garnishee, by paying the proceeds of the policy into court in Pittsburgh under the circumstances aforesaid in a case in which Mrs. Dunlevy was a party defendant regularly served with process of summons, had thereby discharged its liability to her on account of said policy. Passing by this controlling fact, the Court dealt only with the so-called Feigned Issue which was formed and tried after your Petitioner discharged its obligation by paying the proceeds of the policy into Court as aforesaid, treated said

Feigned Issue as an Independent suit, and therefore held that the judgment in the Feigned Issue was not binding upon Mrs. Dunlevy because she was not served with process of summons, and did not appear, therein.

Nor does the dissenting opinion, which holds that "the judgment should be modified by deducting therefrom the amount of the Boggs & Buhl judgment, including interest and costs", hit directly the legal merits of the case. Your Petitioner did not agree to pay this policy in parts, it agreed to pay it in one sum as a whole. And when a Court having jurisdiction over the owner of the policy undertook by proper legal process to subject the policy to the satisfaction of a judgment of the Court against the policy-holder, the Court had authority to order your Petitioner to pay the policy, and it was its duty to pay it, in one sum into Court.

Nor did your Petitioner agree in the policy to pay one creditor of the policy-holder one sum and another another; no more did it agree to administer the policy-holder's insolvent estate. It obligated itself to do precisely what it did do in the Pittsburgh Court, nothing more. It discharged its entire undertaking once and for all when it paid the policy into the Pittsburgh Court under the circumstances which have been stated.

Your Petitioner furnishes as an Exhibit to this Petition a certified copy of the entire transcript of record of said California case, including the proceedings in the United States Circuit Court of Appeals for the Ninth Circuit.

Wherefore your Petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to the Supreme Court for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in said Cir-

cuit Court of Appeals in said case therein entitled "New York Life Insurance Company, a Corporation, Plaintiff-in-Error, vs. Effie J. Gould Dunlevy, Defendant-in-Error, No 2349", pursuant to Section 240 of The Judicial Code, and that said judgment of said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court, and that your Petitioner may have such other or further relief or remedy in the premises as to this Honorable Court may seem meet and in conformity with said act.

And your Petitioner will ever pray, etc.

EDWARD J. McCUTCHEN,
Attorney for Petitioner.

WARREN OLNEY, JR.,
CHARLES W. WILLARD,
J. M. MANNON, JR., and
JAMES H. McINTOSH,
of Counsel.

STATE OF NEW YORK,
COUNTY AND CITY OF NEW YORK, } *ss.*

JAMES H. McINTOSH, of lawful age, being first duly sworn, deposes and says that he is one of the counsel for New-York Life Insurance Company, the Petitioner; that he prepared the foregoing Petition, and that the allegations thereof are true as he verily believes.

James H. McIntosh

Subscribed in my presence and sworn to before me this 7th day of November, 1914.

Ida Taylor

Notary Public, No. 64 Kings County,
Certificate filed in New York Co., No. 79.
My Commission expires March 30, 1916.

Seal